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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SELTZER CAPLAN McMAHON VITEK, a Law Corporation, Defendant/Petitioner, vs. DAMON ABNOS, an individual, Plaintiff/Respondent.	CASE NO. 3:08-cv-00201-WQH-WMc **DEFENDANT/PETITIONER SELTZER CAPLAN McMAHON VITEK'S POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO REMAND TO STATE COURT** Judge: Hon. William Q. Hayes Courtroom: 4 (4th Floor) Date: April 1, 2008 Time: 11:00 a.m. **NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT**

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I. INTRODUCTION

After years of delinquency in paying the legal bills he incurred at the start of his divorce proceeding, Plaintiff/Respondent Damon Abnos ("Mr. Abnos") filed suit in state court against his former attorneys, claiming legal malpractice. After haling Defendant/Petitioner Seltzer Caplan McMahon Vitek ("SCMV") into court, Mr. Abnos finally acknowledged that he was contractually required to submit his dispute to binding arbitration and signed a stipulation. Unhappy with the result of that arbitration—and apparently unwilling to contest the award in favor of SCMV in the same forum he initially chose as Plaintiff—Mr. Abnos removed SCMV's Petition to Confirm the Arbitration Award ("Petition") from the state proceeding he initiated.

Now, there are three issues facing the Court in deciding whether to remand:

(1) The right to remove a case from state to federal court is vested exclusively in the defendant. Mr. Abnos, as Plaintiff in this proceeding, chose the state forum. Defendant SCMV filed its Petition in that same state proceeding Mr. Abnos initiated, as required by law. Should the Court remand this action because Mr. Abnos is not a defendant and because SCMV never had any choice in forum?

(2) In the contract he signed requiring binding arbitration, Mr. Abnos agreed that the laws of the State of California applied, and that any challenge to the arbitration award was governed by the arbitration provisions of the California Code of Civil Procedure. Those provisions have specific venue rules, and required SCMV's Petition to be brought in the pending state proceeding. They also required any response by Mr. Abnos to be brought in the same proceeding in which SCMV's Petition was filed. Even if Mr. Abnos is somehow considered a "defendant," did he contractually waive any right to remove?

(3) A party seeking removal is required by statute to attach copies of all state court pleadings to the removal notice. Failure to do so is a defect that prevents removal. Should the Court remand this action because Mr. Abnos failed to attach copies of all pleadings in the state court action, Case Number GIC 864098, to his removal notice?

The answer to all three questions is, "Yes." Accordingly, the Court should grant SCMV's Motion to Remand, and send this matter back to the state court Mr. Abnos originally selected. In addition, the Court should order Mr. Abnos to pay the costs and fees SCMV incurred in response to Mr. Abnos' improper removal.

II. PROCEDURAL BACKGROUND

The procedural history of this case demonstrates Mr. Abnos' extraordinary efforts to delay and obstruct his arbitral day of reckoning, and exposes his removal of SCMV's Petition in the pending state action for the improper attempt at forum shopping that it is.

Despite His Written Agreement to Arbitrate, Mr. Abnos Chooses to File a Lawsuit in San Diego Superior Court.

In November 2003, Mr. Abnos and SCMV entered into a written agreement ("Agreement") whereby SCMV would represent Mr. Abnos in divorce proceedings between Mr. Abnos and his wife, Lori.[1] In October 2004, Mr. Abnos terminated his engagement with SCMV, leaving an unpaid bill for legal services of approximately $75,000.

On April 10, 2006, Mr. Abnos filed a complaint in San Diego Superior Court, case number GIC 864098, against SCMV alleging legal malpractice.[2] SCMV was not served with Mr. Abnos' complaint until July 2006. On August 4, 2006, SCMV sent a letter to Mr. Abnos containing a written demand for arbitration, pursuant to the arbitration clause in the Agreement.[3]

SCMV's August 4, 2006 demand for arbitration notified Mr. Abnos that if he did not submit to arbitration, SCMV would be forced to file a motion to compel arbitration. After initially agreeing in theory to arbitration, Mr. Abnos rejected SCMV's demand. In his Case Management Statement, Mr. Abnos, through counsel, stated, "Plaintiff does not agree to

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1 *See* Notice of Removal, Exhibit C, pp. 9-13.

2 *See* Declaration of Christopher L. Ludmer ("Ludmer Decl."), Exhibit 1.

3 *Id.*, Exhibit 2.

arbitration as to the negligence matter."[4] Accordingly, Mr. Abnos refused to comply with the terms of the Agreement and submit the dispute to arbitration.

On September 28, 2006, the parties and their counsel attempted to mediate their dispute through the court-sponsored mediation program. The mediation was unsuccessful. Not only was the dispute unresolved, but Mr. Abnos again refused arbitration and sought new counsel.

On September 29, 2006, SCMV was then forced to—and did—file a motion to compel arbitration.[5] The court set a hearing date on SCMV's motion for November 3, 2006.

On or before October 4, 2006, Mr. Abnos retained his current counsel, Joseph Maiorano, Esq. On October 24, 2006—after the deadline to file an opposition to SCMV's motion to compel arbitration had already expired—Mr. Maiorano telephoned SCMV's counsel and stated that Mr. Abnos was willing to stipulate to binding arbitration. Accordingly, on November 16, 2006, the parties stipulated to, and the court ordered, binding arbitration.[6] At the same time, the state court stayed the proceeding pending the conclusion of the arbitration.[7]

After Finally Stipulating to Arbitrate, Mr. Abnos Stonewalls for Three Months Over Selecting a Neutral Arbitrator.

After finally agreeing to live up to his contractual obligation to arbitrate on the eve of the court's decision on SCMV's unopposed motion to compel, Mr. Abnos avoided any decisive move toward actual arbitration of the dispute. Over the next three months, SCMV's counsel made repeated attempts to reach an agreement with Mr. Abnos on a neutral arbitrator. After an initial round of proposals, Mr. Abnos stymied any progress for almost three months by ignoring repeated phone calls and letters. Documenting these deliberate delays, SCMV's counsel repeatedly tried to move the process forward, as just one letter illustrates:

> On Monday, December 11, 2006, I left a voicemail at your office requesting an update regarding whether your client had approved your prior selection of

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4 *Id.*, Exhibit 3.

5 *Id.*, Exhibit 4.

6 *See* Notice of Removal, Exhibit C., pp. 5-7.

7 *Id.*

> Judge Hayden as an arbitrator. As you know, when we spoke before Thanksgiving I advised you that we had no problem with Judge Hayden as an arbitrator, but that you should be aware of Judge Hayden's relationship with Reg Vitek of this firm through the Louis M. Welsh Inn of Court, and my own participation in that Inn. We agreed that should not present a problem, but that you should inform your client on the matter. You promised to do so, and get back to me with the result. I have not heard from you since we discussed the matter, and you have not yet returned my telephone call from December 11, 2006. Accordingly, I am writing to request an update on where we stand. While the holidays will likely prevent us from moving forward immediately, I do not wish to delay the commencement of arbitration any longer than absolutely necessary.[8]

Mr. Abnos responded with nothing but silence, as the following excerpt from another letter by SCMV's counsel illustrates:

> As you know, I have sent you several letters and left several telephone messages over the past two months in an effort to agree on an arbitrator and move forward with this case. Despite my attempts, and the fact that it was your client who initiated this dispute, you have not responded in any way.
>
> I ask you again for the courtesy of a response. In the event you fail to respond within a reasonable time, I plan to submit the case and have an arbitrator assigned pursuant to the AAA arbitration rules.[9]

When he finally did respond, Mr. Abnos demonstrated his dilatory tactics by again suggesting a neutral that SCMV had already rejected months earlier:

> Thank you for your voicemail yesterday in response to my January 26, 2007 letter regarding our attempts to select an arbitrator. ***While I appreciate your response, your suggestion of the Hon. Alice Sullivan seems to be moving us backward.***
>
> As background, you will recall that you originally suggested Judge Sullivan on November 8, 2006. On November 10, 2006, I declined your suggestion, and offered two others: the Hon. Herbert B. Hoffman and the Hon. James R. Milliken. I have enclosed your letter and my response for your reference. You in turn declined Judges Hoffman and Milliken. At that point we spoke by telephone several times. I told you that we would agree to the Hon. Richard Haden—whom you suggested along with Judge Sullivan on November 8, 2006—but advised you of his relationship with this firm through the Louis M. Welsh American Inn of Court. I have enclosed my December 15, 2006 letter to you in that regard as well. You informed me that Judge Haden was still agreeable to you, and that you would speak with your client to obtain his consent. It was at that point that I did not hear back from you for approximately six weeks until your voicemail on January 29, 2007.

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[8] Ludmer Decl., Exhibit 5.

[9] *Id.*, Exhibit 6.

Instead of your response concerning Judge Haden that I expected, you again suggested Judge Sullivan.[10]

SCMV is Forced to File an Arbitration Demand With AAA as *Claimant*.

Mr. Abnos himself instigated this dispute by filing his lawsuit in state court accusing SCMV of legal malpractice in an effort to avoid payment of his past due legal fees. Nevertheless, Mr. Abnos' dilatory tactics in first trying to avoid arbitration and then in frustrating the selection of an arbitrator for three months forced SCMV to file a demand for arbitration with the American Arbitration Association ("AAA") as the *claimant*. SCMV did so on February 12, 2007.[11] Even then, Mr. Abnos' pattern of delay continued unabated.

Mr. Abnos Misses the Initial Conference Call with the AAA Case Administrator.

After SCMV filed its claim with AAA, the AAA case administrator, Lisa Allen, contacted the parties and scheduled a telephonic conference for February 28, 2007. SCMV's counsel was present, and took Ms. Allen's call. Mr. Abnos' counsel was unavailable—despite prior notice—forcing Ms. Allen and SCMV's counsel to make certain tentative decisions alone.[12] Mr. Abnos was given until March 8, 2007 to respond.[13]

Mr. Abnos Requests an Extension to Respond to SCMV's Arbitration Claim.

True to form, Mr. Abnos failed to substantively respond by the deadline. Instead, Mr. Abnos requested an extension until March 13, 2007, thus delaying the process further.[14] When he finally did respond, Mr. Abnos found a creative way to stonewall yet again.

Mr. Abnos Requests an Extension to Pay the AAA Filing Fee for His Counterclaim.

After delaying his response, Mr. Abnos filed his counterclaim, but conveniently neglected to pay his administrative filing fee. After the case administrator set a deadline for Mr. Abnos to do so, Mr. Abnos requested yet another delay—to April 13, 2007.[15]

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[10] *Id.*, Exhibit 7 [emphasis added].

[11] *Id.*, Exhibit 8.

[12] *Id.*, Exhibit 9.

[13] *Id.*

[14] *Id.*, Exhibit 10.

[15] *Id.*, Exhibit 11.

Mr. Abnos Requests to Stay the Arbitration Pending the Outcome of a Lawsuit in Missouri Against His Ex-Wife Seeking the Same Damages as His Arbitration Counterclaim.

During his delays over selection of an arbitrator and the various AAA deadlines, Mr. Abnos, through counsel, asked counsel for SCMV to stay the arbitration in its entirety. The reason Mr. Abnos gave was that he had filed—or was going to file—a lawsuit in Missouri against his ex-wife seeking the same damages he sought by way of his counterclaim against SCMV. Mr. Abnos' counsel represented that if Mr. Abnos was successful in that Missouri lawsuit, he would have no need to seek the same damages against SCMV, and the arbitration could therefore just go away. SCMV's counsel rejected Mr. Abnos' stay request for two reasons: 1) whether or not Mr. Abnos was entitled to recover any alleged "damages" from his ex-wife had nothing to do with SCMV's claim against Mr. Abnos for unpaid legal fees; and 2) SCMV was unwilling to postpone the arbitration any longer, and certainly not for the indefinite duration of a lawsuit in another state against another party.

Mr. Abnos Files a Lawsuit in Missouri Against His Ex-Wife Seeking the Same Damages as his Arbitration Counterclaim.

On May 22, 2007, as he had suggested he would, Mr. Abnos filed a lawsuit in Missouri against his ex-wife and her parents seeking essentially the same "damages" ($2,000,000) for the same core conduct by his ex-wife—supposedly destroying evidence—that formed the basis for his counterclaim against SCMV.[16] This was a mere two weeks before the June 5, 2007 preliminary hearing with the Arbitrator.

The Arbitrator Informs the Parties that She Will Be Unavailable For Much of October and November 2007.

At the preliminary hearing, the Arbitrator, with the agreement of the parties, scheduled the arbitration hearing for September 17-20, 2007. At the same time, the Arbitrator informed the parties that in the event of any requests for continuance, she would be unavailable for much of October and November 2007.

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[16] *Id.*, Exhibit 12.

Mr. Abnos Requests to Postpone All Arbitration Dates for "At Least 30 Days" With Full Knowledge of the Arbitrator's Unavailability.

On August 10, 2007, Mr. Abnos requested to postpone all arbitration dates for "at least 30 days."[17] A delay of "at least 30 days" would have delayed the arbitration hearing until at least October 17, 2007. Because his counsel was present at the preliminary hearing, Mr. Abnos reasonably knew this request would delay the arbitration far longer than 30 days given the Arbitrator's scheduling conflicts in October and November 2007. The arbitrator, after due consideration, denied Mr. Abnos' continuance request.

Mr. Abnos Skips the Arbitration Hearing.

On September 17, 2007, the arbitration hearing began as scheduled. There was a problem though. One of the parties, Mr. Abnos, decided not to show up. Despite more than sufficient prior notice of the hearing, Mr. Abnos decided to travel overseas and have the hearing proceed in his absence. For three days the arbitrator heard witnesses and received evidence from both sides.

At that point, Mr. Abnos' counsel asked the arbitrator to hold the hearing open, and schedule a future hearing date to take Mr. Abnos' testimony. Over SCMV's objection, the arbitrator granted the request, and a special hearing to take Mr. Abnos' testimony was scheduled for Sunday, December 2, 2007. Mr. Abnos then appeared and testified on December 2, 2007, after which the arbitrator adjourned the arbitration hearing.

The Arbitrator Rules in SCMV's favor on All Claims and Counterclaims.

Finally, on December 26, 2007—more than a year and a half after Mr. Abnos filed suit in state court—the arbitrator ruled in SCMV's favor on all claims and counterclaims. Specifically, in a five-page reasoned award, the arbitrator found that Mr. Abnos' claims lacked any legal and factual support, and that Mr. Abnos was obligated to pay SCMV over $100,000 in overdue legal fees plus interest.[18]

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[17] *Id.*, Exhibit 13.

[18] *See* Notice of Removal, Exhibit C, pp. 17-21.

SCMV Files Its Petition to Confirm the Arbitration Award in the Pending State Proceeding that Mr. Abnos Initiated as Plaintiff.

On January 8, 2008, SCMV filed its Petition to Confirm the Arbitration Award ("Petition") in the pending state action, case number GIC 864098.[19] It did so for two reasons: 1) as a matter of law, California courts that order arbitration maintain vestigial jurisdiction to confirm, vacate, or modify arbitration awards;[20] and 2) because SCMV had previously filed a motion to compel arbitration, it was required by law to file its Petition in the same proceeding.[21] A hearing date was set for February 29, 2008.

Instead of Responding to SCMV's Petition in State Court, Mr. Abnos Files a New Action in Federal Court to Vacate the Arbitration Award.

Unhappy with the outcome of the lawsuit he began in state court—and even more so at the outcome of the arbitration he tried so hard to avoid—Mr. Abnos shopped for another forum to air his grievances. Rather than respond to SCMV's Petition in the same pending state court proceeding as required by law,[22] Mr. Abnos began an entirely new action in federal court. On January 10, 2008, Mr. Abnos filed a Petition to Vacate the Arbitration Award in the U.S. District Court for the Southern District of California, Case Number 3:08-cv-00058-DMS-WMc.[23]

Mr. Abnos Initiates a Second Federal Action By Removing SCMV's State Petition.

Not content with one federal proceeding concerning the arbitration award, Mr. Abnos then removed SCMV's Petition in the pending state action to this Court on February 1, 2008, Case Number 3:08-cv-00201-WQH-WMc.

SCMV now brings this Motion to Remand its Petition to state court.

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19 Ludmer Decl., Exhibit 14.

20 *See* California Code of Civil Procedure § 1292.6.

21 *Id.*

22 *Id.*

23 Ludmer Decl., Exhibit 15.

III. ARGUMENT

A. THE LEGAL STANDARD IN DECIDING THIS MOTION IS HEAVILY WEIGHTED IN FAVOR OF REMAND.

This motion for remand effectively forces Mr. Abnos—as the party who invoked the federal court's removal jurisdiction—to prove by a preponderance of the evidence whatever is necessary to support his petition: e.g., the existence of diversity, the amount in controversy, or the federal nature of the claim.[24] He also has the burden of showing that he has complied with the procedural requirements for removal.[25] The most basic statutory requirement Mr. Abnos must prove is that he is a defendant.[26]

It is a well-settled rule of construction that the removal statutes are to be strictly construed against removal.[27] It follows that in deciding a motion to remand, any doubt should be resolved against removal.[28] In this Circuit, there is "strong presumption" *against* removal jurisdiction and the Court should reject such jurisdiction "if there is any doubt as to the right of removal in the first instance."[29]

This is not mere rubric; it is a very practical guide. If at some point later in the litigation the trial court's decision in favor of removal is thought to be imprudent, there would be no obstacle to then raising the lack of federal jurisdiction.[30] That would be so even as late as when there is a petition for a rehearing before the Supreme Court.[31] The dollars, the time, and the effort of litigation and appeal would all be for naught if the trial court erred.

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[24] *Gaus v. Miles, Inc*. (9th Cir. 1992) 980 F.2d 564, 566; *B., Inc. v. Miller Brewing Co.* (5th Cir. 1981) 663 F.2d 545, 549; *Kenneth Rothschild Trust v. Morgan Stanley Dean Witter* (C.D. CA 2002) 199 F.Supp.2d 993, 1000 (citing text).

[25] *California ex rel. Lockyer v. Dynegy, Inc.* (9th Cir. 2004) 375 F.3d 831, 838; *Miller v. Diamond Shamrock Co.* (5th Cir. 2001) 275 F.3d 414, 417.

[26] *See* 28 U.S.C. § 1441(a).

[27] *Shamrock Oil Corp. v. Sheets* (1941) 313 U.S. 100, 107; *Aguiar v. Evans* (E.D.Va.1985) 607 F.Supp. 1418, 1420;

[28] *Rosack v. Volvo of America Corp.* (N.D. Cal. 1976) 421 F.Supp. 933, 937.

[29] *Gaus v. Miles, Inc., supra*, 980 F.2d at 566.

[30] *See Wenger v. Western Reserve Life Assur. Co. of Ohio* (M.D. Tenn. 1983) 570 F.Supp. 8, 10-11; *Somlyo v. J. Lu-Rob Enterprises, Inc.* (2nd Cir. 1991) 932 F.2d 1043, 1045-1046.

When both parties have expended a large amount of money on litigation they generally do not want to revisit the question of jurisdiction. But when there has *been* a ruling a party on the losing end may very well then want to revisit jurisdiction. Such a revisit may be fatal. Lack of jurisdiction cannot be waived nor can a party be estopped from raising the issue.[32] And it must not be forgotten a court has a duty to *sua sponte* raise lack of jurisdiction. Specifically regarding removal, the Ninth Circuit has held that a district court has an independent obligation to examine whether removal jurisdiction exists before deciding any issue on the merits.[33] These consequences compel resolving any doubt in favor of remand. Upon remand all doubt as to jurisdiction dissolves.

With this understanding of the legal and practical posture of a motion to remand, we turn to consider the facts and law as presented in the instant case.

B. MR. ABNOS IS THE PLAINTIFF IN THE STATE COURT PROCEEDING, AND CANNOT REMOVE AS A MATTER OF LAW.

The plain words of the removal statute show clearly that the right to remove is confined to "the defendant or the defendants."[34] The purpose of the removal statute in limiting removal to defendants is to restrict the right to the party who had no choice in the selection of the forum.[35] The party who, by his own affirmative and voluntary act, chose the jurisdiction of the state court, should be bound by his choice of forum.[36]

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[31] *See*, 28 U.S.C. § 1447(c); *Libhart v. Santa Monica Dairy Co.* (9th Cir. 1979) 592 F.2d 1062, 1065.

[32] *See* Federal Rule of Civil Procedure 12(h)(3); *see also Billingsley v. C.I.R.* (9th Cir. 1989) 868 F.2d 1081, 1085.

[33] *Valdez v. Allstate Ins. Co.* (9th Cir. 2004) 372 F.3d 1115, 1116; *see also University of South Alabama v. American Tobacco Co.* (11th Cir. 1999) 168 F.3d 405, 410-11.

[34] 28 U.S.C. § 1441(a).

[35] *See Mohawk Rubber Co. of New York v. Terrell* (W.D. Mo. 1926) 13 F.2d 266.

[36] *See Haney v. Wilcheck* (W.D.Va. 1941) 38 F.Supp. 345.

Mr. Abnos, by his own voluntary act, chose to file his lawsuit in California state court as Plaintiff. He could have initially brought suit in federal court on the same basis as he alleges now—diversity of citizenship. He did not. He could have initially abided by his contractual duty to arbitrate instead of filing any lawsuit at all. He did not. Mr. Abnos is therefore bound by his choice of the state forum.

Moreover, SCMV never had any choice in forum. It was originally haled into state court by Mr. Abnos. Because Mr. Abnos refused to abide by his agreement to arbitrate, SCMV was forced to file a Motion to Compel Arbitration in the action at law Mr. Abnos brought.[37] Once it did so, by law, any subsequent petition regarding the arbitration by SCMV or Mr. Abnos *had* to be filed in the same state proceeding.[38]

Here, in what can only be described as an attempt at forum shopping—and to delay and increase the expense for SCMV to enforce the arbitration award—Mr. Abnos tries to cast himself as a "defendant" in the state court action. He does so by arguing that because the parties voluntarily dismissed their claims—after they were already stayed and submitted to binding arbitration—the entire action was terminated for all purposes.[39] Thus, Mr. Abnos argues, SCMV's Petition was not part of the pending action where he was Plaintiff, but rather initiated a completely new action, making Mr. Abnos the "defendant."[40] While admittedly clever, as described below that argument is factually and legally without merit. Accordingly, the Court should remand this action to the state court Mr. Abnos chose—an action where Mr. Abnos is the Plaintiff.

1. The Court Should Apply California Law to Determine Whether SCMV's Petition Began a "New" Action.

As an initial matter, the Court must decide whether a federal court sitting in diversity should apply state law in determining when an action is terminated for the purpose of confirming an arbitration award. Federal courts sitting in diversity are required to apply state law as to the "rule of decision."[41] This requires applying state law to "substantive" issues, and federal law, generally, as to "procedural" issues.[42] However, even state procedural rules are deemed "substantive" if applied to a particular substantive area and designed to accomplish a particular substantive objective.[43] Here, the Court should apply California law to determine whether SCMV's Petition began an entirely "new" action as Mr. Abnos suggests, because the effect of a court staying an action and ordering binding arbitration—and a dismissal on an action that has been previously submitted to binding arbitration—is integral to California's arbitration scheme and embodies state substantive policy. It is thus "substantive" both in purpose and effect.[44]

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[37] California Code of Civil Procedure § 1292.4.

[38] California Code of Civil Procedure § 1292.6.

[39] Notice of Removal, p. 2, ll. 14-16.

[40] *See id.* at ll. 16-17.

As the California Supreme Court has explained, Title 9 of the California Code of Civil Procedure (section 1280 et seq.) "represents a comprehensive statutory scheme regulating private arbitration in this state."[45] Through this statutory scheme, "the [California] Legislature has expressed a 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.'"[46] This is not surprising. For more than 90 years the California Supreme Court has held similarly:

> The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing.[47]

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[41] *See* 28 U.S.C. § 1652; *Erie Railroad Co. v. Tompkins* (1938) 304 U.S. 64, 78.; *Continental Ins. Co. v. Metro-Goldwyn-Mayer, Inc.* (9th Cir. 1997) 107 F.3d 1344, 1346 ("In a diversity case we apply state substantive law"); *Nevada Power Co. v. Monsanto Co.* (9th Cir. 1992) 955 F.2d 1304, 1306 ("This matter was before the district court under its diversity jurisdiction, and hence state substantive law applies").

[42] *Erie, supra,* 304 U.S. at 78-79.

[43] *See S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist.* (7th Cir. 1995) 60 F.3d 305, 310.

[44] *See, e.g., Brennan v. Lermer Corp.* (N.D.Cal. 1986) 626 F.Supp. 926, 930 [tolling of statute of limitations].

[45] *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.

[46] *Id.* (citation omitted).

[47] *Utah Const. Co. v. Western Pac. Ry. Co.* (1916) 174 Cal. 156, 159.

Thus, even the arguably "procedural" provisions of Title 9 of the California Code of Civil Procedure that relate to contractual arbitration—including those venue sections regarding any post-arbitration petition to confirm or vacate an award—are integral to California's arbitration scheme and embody state substantive policy.[48] They are thus "substantive" under *Erie* and should be applied by this Court.

As explained below, under California law, once the state court stayed the action and ordered—through stipulation—binding arbitration, the action at law was abated. The state court retained vestigial jurisdiction to confirm or vacate any subsequent arbitration award in *the same proceeding*. The voluntary dismissal on which Mr. Abnos seeks to hang his removal hat had no effect whatever on the pending action or the arbitration. SCMV's Petition filed in that action was therefore not a "new action," and Mr. Abnos is not a "defendant" in any sense of the term under the removal statute.

2. SCMV Filed its Petition in a Pending State Action Where Mr. Abnos is Plaintiff.

The sole basis by which Mr. Abnos contends he is a "defendant" under the removal statute is his argument that SCMV "improperly filed the [P]etition as a 'pending action' under San Diego Superior Court Case No. GIC 864098."[49] According to Mr. Abnos, the voluntary dismissal of the claims after the case was stayed and after the state court ordered binding arbitration had the effect of dismissing "the entire action."[50] Thus, Mr. Abnos contends, SCMV's Petition began an entirely "new action," making him a "defendant" able to remove that Petition to federal court.[51] Mr. Abnos is mistaken.

As explained below, by the time the parties voluntarily dismissed their claims, the matter had already been stayed and relegated to arbitration. Thus, barring a subsequent stipulation not to arbitrate, the judicial system's future involvement was limited merely to confirming, correcting, or vacating any arbitration award. The dismissal therefore had no legal effect, and certainly did not terminate the pending action—or the trial court's vestigial jurisdiction in that pending action to enter judgment on the arbitration award.

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[48] *See, e.g., Brennan v. Lermer Corp.* (N.D.Cal. 1986) 626 F.Supp. 926, 929.

[49] Notice of Removal, p. 2, ll. 13-14.

[50] *Id.* at ll. 14-16.

[51] *Id.* at ll. 16-17.

a. Dismissal of the Stayed Complaint and Cross-Complaint was a Superfluous Act That Did Not Divest the Court of Jurisdiction to Determine SCMV's Subsequent Petition to Confirm the Arbitration Award.

The flaw in Mr. Abnos' reasoning is his failure to understand that once an action is stayed pending binding arbitration, a dismissal has no effect whatever on the action.

Contractual arbitration is not a "trial of a cause before a judicial tribunal," nor does it necessarily expel the judicial power vested in the trial court by the California Constitution.[52] Therefore, nothing prevents a party to a contractual arbitration provision from resorting initially to an action at law.[53] That is exactly what Mr. Abnos did when he filed his complaint in state court.

The defendant, SCMV, if determined to pursue arbitration, must then move to compel that arbitration.[54] This is because "[a] right to compel arbitration is not…self-executing. If the [defendant] wishes to compel arbitration, he must take active and decided steps to secure that right, and is required to go to the court where the [plaintiff's] action [at law] lies."[55] Thus, a defendant who is haled into court and seeks to enforce the contractual arbitration provision must file a motion to compel arbitration under California Code of Civil Procedure section 1281.2 in the action at law.[56] The defendant seeking resolution via contractual arbitration must also move in the action at law to stay it—it will not be stayed automatically.[57] That is precisely what SCMV did.[58] As a matter of law, the assertion of a contractual arbitration agreement constitutes a "plea in abatement" of the civil action.[59]

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[52] *Snyder v. Superior Court* (1937) 24 Cal.App.2d 263, 267.

[53] *Spence v. Omnibus Industries* (1975) 44 Cal.App.3d 970, 975; *Ross v. Blanchard* (1967) 251 Cal.App.2d 739, 742-743.

[54] *Spence, supra,* 44 Cal.App.3d at 975.

[55] *Gunderson v. Superior Court* (1975) 46 Cal.App.3d 138, 143.

[56] *Id.* at 144; *see also* Code of Civil Procedure § 1281.5.

[57] Code of Civil Procedure §§ 1281.4, 1292.8; *Ross, supra,* 251 Cal.App.2d at 742.

Once a court grants the petition to compel arbitration—or orders arbitration under a stipulation—and the action at law is stayed, it "sits in the twilight zone of abatement with the trial court retaining merely a vestigial jurisdiction over matters submitted to arbitration."[60] During that time, under its "vestigial" jurisdiction, a court may only: appoint arbitrators if the method selected by the parties fails;[61] grant a provisional remedy "but only upon the ground that the award to which an applicant may be entitled may be rendered ineffectual without provisional relief'";[62] and confirm, correct or vacate the arbitration award.[63] Absent an agreement to withdraw the controversy from arbitration, however, no judicial act is authorized.[64] As the California Court of Appeals put it, "This vestigial jurisdiction over the action at law consists solely of making the determination, upon conclusion of the arbitration proceedings, of whether there was an award on the merits."[65]

"After a petition has been filed under [Title 9 (Code of Civil Procedure sections 1280-1294.2)], the court in which such petition was filed retains jurisdiction to determine *any subsequent petition* involving the same agreement to arbitrate and the same controversy, and *any such subsequent petition* shall be filed in the same proceeding."[66]

Thus, a trial court has jurisdiction to grant a petition to compel arbitration under section 1281.2, which by virtue of Title 9's venue statute (section 1292.4) must be filed in the action at law. Likewise, it has jurisdiction to stay the action at law (again, by virtue of the venue statute (section 1292.8)). *Either* of these actions vests the trial court with jurisdiction under section 1292.6 over any subsequent petition relating to the arbitration proceedings.[67]

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[58] Ludmer Decl., Exhibit 4.

[59] *Gunderson, supra,* 46 Cal.App.3d at 144.

[60] *Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1796.

[61] Code of Civil Procedure § 1281.6.

[62] Code of Civil Procedure § 1281.8(b).

[63] Code of Civil Procedure § 1285.

[64] *Byerly v. Sale* (1988) 204 Cal.App.3d 1312, 1315.

[65] *Brock, supra,* 10 Cal.App.4th at 1796.

[66] Code of Civil procedure § 1292.6 [emphasis added].

Here, after SCMV filed its Motion to Compel Arbitration, the state trial court stayed the action and ordered binding arbitration under a stipulation by the parties.[68] At that point, Mr. Abnos' action at law "[sat] in abeyance until resolution of the contractual arbitration proceedings."[69]

More than six months later, the parties voluntarily dismissed their claims and cross claims in the action at law and while the arbitration hearing was still pending.[70] Under these circumstances, the California Court of Appeals likened the dismissal Mr. Abnos finds so significant to "burning a dock after the ship has sailed. Like the dock, the complaint will be of significance only if the parties choose to return to a judicial port to litigate the dispute on the merits."[71] The only effect of dismissal, then, is that it prevented the parties from stipulating to go back to litigate the dispute in court on the merits. It did not terminate the entire action.

In *Byerly v. Sale*, Plaintiff Ann Byerly, bound by an arbitration agreement, nevertheless brought an action for medical malpractice. On the defendant's petition, the matter was sent to arbitration, and languished there until the statutory period ran for failure to "bring an action to trial." The defendant then moved to dismiss the action at law, which the trial court granted. But as the Court of Appeals explained, there was effectively nothing for the trial court to dismiss:

> The agreement [Plaintiff] signed rendered her civil action for medical malpractice superfluous in the first place: She could have avoided that step and proceeded directly to arbitration. But Byerly did initiate a lawsuit, and it was necessary for the court to formally relegate it to the arbitration system. At that point the complaint, "having fulfilled [its] purpose, became virtually *functus*

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67 *Brock, supra*, 10 Cal.App.4th at 1804.

68 Notice of Removal, Exhibit C, pp. 5-7.

69 *Brock, supra*, 10 Cal.App.4th at 1806.

70 Notice of Removal, Exhibit A.

71 *Byerly, supra*, 204 Cal.App.3d at 1316.

> *officio*." Barring a subsequent stipulation not to arbitrate, the judicial system's future involvement should have been limited merely to confirming, correcting, or vacating any arbitration award. In other words, the court no longer had any reason to entertain the motion to dismiss the complaint here.[72]

The *Byerly* Court borrowed the phrase *functus officio* from another Court of Appeals opinion in *Dodd v. Ford*.[73] In Dodd, the Court of Appeals explained why a dismissal did not terminate the legal vitality of an action at law where the claims were already relegated to arbitration:

> The superior court dismissal did not terminate the legal vitality of this action. When the agreement for binding arbitration was reached, the pleadings in the civil action, having fulfilled their purpose, became virtually *functus officio*. Despite the dismissal, the arbitration agreement could be independently enforced within the period of the statute of limitations on petition to the superior court; and ***any resulting award could be confirmed in the same manner, without reference to the complaint or cross-complaint.*** Dismissal of the complaint and cross-complaint could not bar enforcement of the agreement, because the dismissal was not on the merits.[74]

Thus, the *Dodd* Court concluded, "dismissal, even if appropriate, merely reduced the court's involvement to hearing motions to compel arbitration and ***enforce any award***."[75] That is all SCMV's Petition asks the state court to do: enforce the arbitration award.

The phrase the Court of Appeals used to describe pleadings and claims in an action already relegated to arbitration, "*functus officio*," is telling. Black's Law Dictionary defines *functus officio* as, "A task performed….Having fulfilled the function…or accomplished the purpose, and therefore of no further force or authority."[76] Because the complaint and cross-complaint had no legal authority or effect once the action was stayed and the claims submitted to binding arbitration, the dismissal of those claims had "absolutely no effect on the pending arbitration."[77] Because, as demonstrated above, the court retains jurisdiction in the *pending* action to confirm, vacate, or modify an arbitration award under the statutory arbitration scheme, and because SCMV was required to file its Petition in the *same action*, the action Mr. Abnos started as Plaintiff—Case Number GIC 864098—was not terminated by the dismissal.

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[72] *Id.* at 1315 [citations omitted].

[73] *Dodd v. Ford* (1984) 153 Cal.App.3d 426.

[74] *Id.* at 432 [emphasis added].

[75] *Id.* [emphasis added].

[76] *Black's Law Dictionary*, 673 (6th ed. 1990).

[77] *Byerly, supra*, 204 Cal.App.3d at 1314.

b. The Action Mr. Abnos Began is Still Pending Under California Law By Definition.

In addition to the fact that the dismissal had no legal effect after the controversy was already sent to arbitration and the action at law was abated, California's definition of a "pending action" refutes Mr. Abnos' argument. Under California Code of Civil Procedure section 1049, "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."[78]

Only when the state court actually confirms the arbitration award is an enforceable judgment entered with the same force and effect as a judgment in a civil action.[79] The judgment confirming the arbitration award is appealable,[80] as is an order dismissing the petition to confirm.[81]

In sum, because both parties are required by law to file any "petition involving the same agreement to arbitrate and the same controversy" in the same pending proceeding, and because the time for appeal has not passed (the court has not yet entered judgment on the award), Case Number GIC 864098—the case Mr. Abnos initiated as Plaintiff—is still "pending." Indeed, when SCMV filed its Petition and checked box 3a telling the court that the Petition was being filed in a pending action, the court accepted it, knowing full well that it had previously dismissed the complaint and cross-complaint. Accordingly, SCMV's Petition did not commence a "new action," and Mr. Abnos is not a "defendant" under the removal statute.

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[78] *See also, Collins v. Ramish* (1920) 182 Cal. 360, 366.

[79] California Code of Civil Procedure § 1287.4; *see Britz v. Alfa-Laval Food & Dairy Co.* (1995) 34 Cal.App.4th 1085, 1106.

[80] California Code of Civil Procedure § 1294(d).

[81] *Id.* at § 1294(b).

C. MR. ABNOS CONTRACTUALLY WAIVED ANY RIGHT TO REMOVE.

Even if Mr. Abnos can somehow be construed as a "defendant"—he is not—a defendant may contractually waive his right to remove a case to federal court.[82] If he ever had any such right in the first place, Mr. Abnos waived it by signing the Arbitration Agreement with SCMV.

That arbitration agreement, by its terms, provides that any challenge Mr. Abnos desires to make to the arbitration award can only be according to the California Code of Civil Procedure provisions relating to arbitration:

> THE LAWS OF THE STATE OF CALIFORNIA PERTAINING TO BINDING ARBITRATION ALSO SHALL APPLY, AND JUDGMENT ON THE ARBITRATOR'S DECISION MAY BE ENTERED IN ANY COURT OF COMPETENT JURISDICTION. NEITHER PARTY MAY SEEK AN APPEAL OR REVIEW OF THE ARBITRATOR'S DECISION EXCEPT UPON THE GROUNDS SPECIFIED IN CALIFORNIA CODE OF CIVIL PROCEDURE SECTIONS 1285 AND FOLLOWING.[83]

In addition to the fact that, as demonstrated above, this Court is not a court of competent jurisdiction by virtue of Mr. Abnos' improper removal, the provisions of the California Code of Civil Procedure that the parties' agreed would govern any challenge effectively waived any right to remove.

For example, because of the venue provisions in sections 1292.4 and 1292.6 of the California Code of Civil Procedure, any petitions relating to the arbitration were required to be filed in the pending action at law. Section 1292.4 requires that "[i]f a controversy referable to arbitration under an alleged agreement is involved in an action or proceeding pending in a superior court, a petition for an order to arbitrate shall be filed in such action or proceeding." SCMV did file such a petition to compel arbitration in the action Mr. Abnos brought. It does not matter whether arbitration was ultimately ordered by granting that petition, or by stipulation. The fact remains Mr. Abnos forced SCMV to file the petition to compel arbitration

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82 *See, e.g., Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.* (9th Cir. 1984) 741 F.2d 273, 279.

83 Notice of Removal, Exhibit C, pp. 12-13 [capitalization in original].

in order to enforce the parties' agreement. Only afterward—and after missing his deadline to respond—did Mr. Abnos agree to stipulate.

That petition to compel arbitration SCMV filed in Mr. Abnos' action at law, in turn, triggered certain statutory venue requirements and limitations. Specifically, section 1292.6 directs that "[a]fter a petition has been filed under [title 9], the court in which such petition was filed retains jurisdiction to determine ***any subsequent petition*** involving the same agreement to arbitrate and the same controversy, ***and any such subsequent petition shall be filed in the same proceeding***" [emphasis added].

Thus, SCMV simply filed a petition to confirm the arbitration award. It did so in an action Mr. Abnos filed that was still pending, because even after dismissal, the trial court—based on SCMV's motion to compel arbitration and the court's order following the parties' stipulation—maintained vestigial jurisdiction to confirm or vacate the arbitration award.[84] SCMV was required by law to file its Petition in the same proceeding, Case Number GIC 864098.[85] Moreover, Mr. Abnos was required by the same law to file any challenge to SCMV's Petition in that same state proceeding.

Thus, by agreeing to be governed by the California Code of Civil procedure provisions relating to arbitration, and because under those provisions venue over SCMV's Petition—and any subsequent petition or opposition to it—lies exclusively in the same state proceeding, Mr. Abnos waived any right he may have had to remove SCMV's Petition to federal court.

D. MR. ABNOS' FAILURE TO ATTACH COPIES OF ALL PLEADINGS AND PROCESS IN THE STATE COURT ACTION TO HIS REMOVAL NOTICE MAKES REMOVAL DEFECTIVE.

A copy of all pleadings, process, and orders served on the removing "defendant" in the state action must be filed with the removal notice.[86] Mr. Abnos failed to do so.

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[84] *Brock, supra,* 10 Cal.App.4th at 1796.

[85] California Code of Civil Procedure § 1292.6.

[86] 28 U.S.C. § 1446(a); *Kisor v. Collins* (N.D. AL 2004) 338 F.Supp.2d 1279, 1280.

First, as demonstrated above, the "action" Mr. Abnos removed is the same one he initiated as Plaintiff, Case Number GIC 864098, which was still pending before removal. He failed to attach copies of all pleadings served on him—such as SCMV's Motion to Compel Arbitration, Answer and Cross-complaint—in that action.[87]

Second, even if Mr. Abnos is a "defendant" because SCMV's Petition began a "new" action, Mr. Abnos failed to attach a copy of the Notice of Hearing and Petition served on him on January 17, 2007, setting the hearing date for SCMV's Petition for February 29, 2008.[88]

Thus, under any scenario, Mr. Abnos has failed to comply with the requirements of the removal statute and the Court should remand this action.

E. SCMV IS ENTITLED TO RECOVER ITS COSTS AND ATTORNEYS FEES AS SANCTIONS FOR MR. ABNOS' IMPROPER REMOVAL.

1. The Removal Statute Provides for Sanctions Even Without Bad Faith.

On granting a motion for remand, the Court may order Mr. Abnos to pay SCMV its "just costs and any actual expenses, *including attorney fees*, incurred as a result of the removal."[89] The statutory purpose of such an award is to deter the possibility of abuse, unnecessary expense and harassment if a party improperly removes an action.[90] It is not necessary to show that the removing party's position was "frivolous, unreasonable or without foundation."[91]

On remand, the costs and fees awardable under section 1447(c) are those "incurred as a result" of the removal. This means costs and fees in *opposing removal and seeking remand* that would not have been incurred had the case remained in state court.[92] An award may be made regardless of whether the party urging remand has in fact paid any of the fees and costs resulting from removal; e.g., where a party's case is being handled on a contingency fee or *pro bono* basis.[93] Thus, the costs and fees "incurred" by SCMV as a result of the removal are recoverable even though SCMV is represented by one of its own attorneys.

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[87] *Compare* Notice of Removal *and* Ludmer Decl., Exhibits 4, 16-17.

[88] Ludmer Decl., Exhibit 18.

[89] 28 U.S.C. § 1447(c) [emphasis added]; *see Martin v. Franklin Capital Corp.* (2005) 546 U.S. 132, 135-136.

[90] *Circle Industries USA, Inc. v. Parke Const. Group, Inc.* (2nd Cir. 1999) 183 F.3d 105, 109.

[91] *Martin v. Franklin Capital Corp., supra*, 546 U.S. at 137.

[92] *Avitts v. Amoco Production Co.* (5th Cir. 1997) 111 F.3d 30, 32; *Huffman v. Saul Holdings Ltd. Partnership* (10th Cir. 2001) 262 F.3d 1128, 1134; *Tenner v. Zurek* (7th Cir. 1999) 168 F.3d 328, 330—may include document preparation and travel expenses related to removal].

2. The Court Should Award SCMV its Costs and Fees Incurred As a Result of Removal.

Because, as demonstrated above, removal was improper, SCMV is entitled to recover attorney fees and costs incurred by Mr. Abnos' removal. Nothing more need be shown. However, Mr. Abnos' conduct over the course of his state lawsuit and the arbitration demonstrates why such sanctions are "just," and that Mr. Abnos' removal is exactly the type of "abuse," "unnecessary expense," and "harassment" 28 U.S.C. section 1447(c) is designed to deter.

As explained in detail in Section II, above, Mr. Abnos' actions in these proceedings—from his initial state court complaint to the removal at issue here—have greatly increased the work of SCMV's attorney, the arbitrator, and now involved three different Judges: The Honorable William R. Nevitt, Jr. in San Diego Superior Court; the Honorable Dana M. Sabraw, United States District Judge in Case Number 3:08-cv-00058-DMS-WMc (were Mr. Abnos filed his Petition to Vacate the Arbitration Award); and the Honorable William Q. Hayes, United States District Judge in this action Mr. Abnos removed from state court. At every turn, for almost two years, Mr. Abnos has unnecessarily increased SCMV's expenses and delayed the just resolution of the case. Under those circumstances, sanctions are appropriate and necessary to deter such conduct.

Taken as a whole, Mr. Abnos' actions show a concerted effort to frustrate and obstruct the speedy and less expensive resolution of this dispute that the parties bargained for in their arbitration agreement, and that the State of California provided for by law. By consistently ignoring the arbitration agreement, stonewalling all attempts to finally move the arbitration

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93 *See Gotro v. R & B Realty Group* (9th Cir. 1995) 69 F.3d 1485, 1488.

forward, willfully failing to show up at the scheduled hearing, and now multiplying—and delaying—the proceedings by attempting to pursue two paralleled federal court actions regarding the same arbitration award, Mr. Abnos obstructed the fair, just, and expeditious resolution of the arbitration and state court proceedings. Mr. Abnos' removal to this Court is merely the latest salvo in that ongoing campaign. These actions were undertaken in violation of, and with reckless disregard for, California's public policy favoring arbitration as a faster and less expensive means of dispute resolution than litigation in court.

Moreover, when Mr. Abnos filed his parallel Petition to Vacate the Arbitration Award in Case Number 3:08-cv-00058-DMS-WMc—after SCMV had already filed its Petition in the pending state action—SCMV sent Mr. Abnos' counsel a letter explaining in detail why Mr. Abnos' federal proceeding under the Federal Arbitration Action was legally and factually improper.[94] SCMV also explained that if Mr. Abnos wished to challenge the arbitration award, he had to do so in the pending state action. Not only did Mr. Abnos fail to dismiss his federal petition, he failed to provide SCMV the courtesy of any response whatsoever. Rather, after weeks of silence, Mr. Abnos filed the Notice of Removal in this action. Even after removal, Mr. Abnos appears to have done nothing to dismiss his parallel federal petition, effectively forcing SCMV to litigate in two separate federal proceedings simply to get confirmation of an arbitration award it sought only after Mr. Abnos filed suit in the first place.

As set forth in the attached Declaration of Christopher L. Ludmer, the amount of the hourly fees SCMV incurred in legal research, analysis, and preparing its Motion to Remand and supporting papers is $17,821. This work was incurred as a result of Mr. Abnos' improper removal.

When evaluated as a whole, Mr. Abnos' actions and his improper removal demonstrate more than amply why he should be required to pay SCMV its "just" expenses under 28 U.S.C. section 1447(c), in the amount of $17,821.

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[94] Ludmer Decl., Exhibit 19.

IV. CONCLUSION

Having tested the state court waters and found them not to his liking, and after losing at the arbitration he fought so hard to delay, Mr. Abnos attempts to use the removal statute to get a third try in federal court and force SCMV to litigate two parallel federal proceedings on the same arbitration award. He does so by mistaking the legal effect of a dismissal on claims already ordered to binding arbitration, ignoring the fact that he waived any right to removal by agreeing to the California venue provisions related to petitions to confirm arbitration awards, and failing to abide by the requirements of the removal statute itself. Moreover, SCMV, the defendant in this pending state action, never had any choice in forum because of the venue provisions of the California Code of Civil procedure relating to arbitration.

When they signed the arbitration agreement, the parties invoked California's public policy of arbitration as a speedy and cost-effective alternative to litigation in court, as well as the state's provisions for confirming and challenging any award. Mr. Abnos should not be allowed to frustrate that policy—and the parties' expectations—any longer. The Court should therefore decline Mr. Abnos' invitation to exercise jurisdiction it lacks, and remand the action to state court. Also, the Court should award SCMV the costs and fees it incurred as a result of Mr. Abnos' improper removal—a removal that is the latest move in history of obstruction and delay.

Respectfully submitted,

Dated: 2/27/08

SELTZER CAPLAN McMAHON VITEK
A Law Corporation

By: [signature]
Christopher L. Ludmer
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